

XII

Coalition Operations: A Compromise or an Accommodation

Vicki McConachie*

*[T]here is no quandary in the mind of Australia's military leaders when we examine where we might need to be technologically; we use interoperability with the United States as a benchmark. However, we must strike a balance that ensures we remain interoperable with both technically advanced allies and those not as technically advanced, but no less important, regional and coalition partners. Australia successfully led the UN effort in East Timor because it had the ability to flex its command and control systems, technology, tactics, techniques and procedures in both directions to accommodate coalition partners across a range of technological capabilities. We must continue to achieve this balance within a tight budget. This will challenge our ingenuity and, I suspect at times, our patience!*¹

Legal interoperability is, in many ways, similar to technological interoperability; it is required for nations to operate effectively in coalitions. However, legal interoperability is also in many ways more difficult to achieve. While it may be relatively easy to persuade those outside the military of the need for technological interoperability, it is perhaps more difficult to persuade those engaged in international negotiations that military interoperability should take precedence over other goals a nation might wish to achieve in becoming a signatory to

* Commodore, Royal Australian Navy. The views expressed in this article are those of the author alone and do not necessarily represent the views of the Australian government, the Australian Defence Force or the Royal Australian Navy.

Coalition Operations: A Compromise or an Accommodation

a proposed international agreement. This means that military planners, with the assistance of their lawyers, must find a practical way to accommodate the various legal needs of their coalition partners while ensuring that operations are not compromised.

In this article I am going to deal with the issues surrounding coalition operations. I will begin with a brief overview followed by a discussion of some of the main constraints, how they are dealt with (both formally and on a practical level) and what opportunities we gain from accommodating the differences of our coalition partners.

Many of the issues surrounding coalition operations are well settled—or at least well-furrowed ground. At the heart of these issues is the fact that coalition members who come together for a common purpose may not be signatories to the same conventions and, even if they are, they may not have a common interpretation of the applicable international law. They may view the nature of the operation as being different in character, one member characterizing the operation as a police action, another as a non-international armed conflict and a third as an international armed conflict. The coalition partners will certainly have varying obligations under their domestic laws and may have quite different domestic political imperatives leading to differing policy guidance. All of this must be accommodated to achieve a successful mission outcome. It is important to note that if you lose public support for operations then political resolve may be undermined, leading to disintegration of a coalition.

On occasion a coalition partner may wish that these differences would have a simple resolution. What must be remembered, however, is that these are coalitions. A coalition is not a group of client States acting subject to a patron's desires. The coalition has come together, usually pursuant to a UN Security Council resolution, and it is composed of sovereign States who have chosen for various reasons to act together to pursue interests that may be different, but which will be served by their presence in the coalition and the actions that they take while members of that coalition. As noted by Rear Admiral Raydon Gates, Royal Australian Navy:

In coalitions, compatible national interests are and certainly must be present, but compatible interests are not necessarily common interests. . . . [I]t follows that within the coalition force we immediately have the potential for a number of different military objectives, reflecting differing national political objectives.²

Nonetheless a coalition partner may feel that, because of its greater commitment in terms of manpower and economic contribution and its ostensible responsibility for the success or otherwise of the mission, it should prevail where there are

differences of opinion. However, this is not the international reality. Rather the reality is that all States must reach an accommodation that satisfies their national obligations and interests.

So does this accommodation lead to a compromise of mission or values for the State actors? While you could characterize this accommodation as representing the lowest common denominator,³ that would be quite wrong. In fact, the accommodations should rather be taken as encouraging the partners to look critically at their rules of engagement and to carefully consider the impact they have on coalition cohesion. It is the accommodation of difference that is the essence of equality⁴ in a coalition of sovereign States.

Key Constraints

There are several areas of difference that have affected coalition operations or given rise to concern between coalition partners over the last decade. These areas include

- Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I);⁵
- Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Ottawa Convention);⁶
- Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights);⁷
- National law, including the criminalization of behavior on the battlefield;
- Rome Statute of the International Criminal Court;⁸ and
- National policy.

Protocol I

A key area of concern in relation to coalition operations has been identified as Protocol I. While many nations who have engaged in coalition activities with the United States are parties to Protocol I, the United States has not ratified the Protocol. This difference in international obligations of itself creates an issue that must be reconciled when planning coalition operations.

In planning operations regard may be given to statements by the United States that it follows the principles underlying Protocol I as part of customary law.⁹ Ostensibly this adds clarity to the obligations that the United States considers binding on itself. However, the matter is complicated by lack of certainty as to the US position in relation to which underlying principles of Protocol I form part of customary

Coalition Operations: A Compromise or an Accommodation

international law. In particular, before September 11, 2001 there seemed to be a degree of certainty as to those parts of Protocol I the United States viewed as not forming part of customary law. This included such matters as

- Its applicability to “wars of national liberation”;
- The prohibition on use of enemy emblems and uniforms during military operations;
- The prohibition on causing widespread, long-term and severe damage to the environment;
- The definition of combatant;
- The prohibition on the use of mercenaries;
- The prohibition on reprisals;
- The definition of military objective; and
- The protection of dams and dykes.¹⁰

Since September 11, 2001, however, there is less certainty as to which provisions the United States views as binding on it as embodying customary international law. In his article “England Does Not Love Coalitions’ – Does Anything Change?,” Charles Garraway says:

It is interesting in reading the so-called “Torture Memos,” to find the almost complete lack of reference to Additional Protocol I. It is as if it has been wiped out of the memory bank. It is no longer even clear whether the United States accepts such key provisions as Article 75 on Fundamental Guarantees. . . . This lack of legal clarity causes acute problems for Allies seeking to work alongside the United States.¹¹

Both the difference in formal legal obligations occasioned by some coalition partners’ being signatory to Protocol I while others are not and the uncertainty as to what parts of Protocol I the United States considers as forming part of customary international law are factors that must be considered in planning for coalition operations.

Ottawa Convention

The Ottawa Convention on anti-personnel mines is another point of difference between the United States and many of its coalition partners. While the United States is not a party to the Ottawa Convention, nations such as Australia, the United Kingdom, Denmark, Japan and the Netherlands, among many others, are parties.

Clearly obligations under the Convention must be considered when examining the contribution a coalition partner may make. In particular, State parties to the Convention undertake

never under any circumstances:

- (a) To use anti-personnel mines;
- (b) To develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, anti-personnel mines;
- (c) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.

2. Each State Party undertakes to destroy or ensure the destruction of all anti-personnel mines in accordance with the provisions of this Convention.¹²

In practical terms for coalition operations, the greatest constraint of the Ottawa Convention is the prohibition on assisting, encouraging and inducing activity that is prohibited under the Convention. This may include such conduct as transporting personnel who have anti-personnel mines in their possession, or refueling aircraft or ships carrying anti-personnel mines.

The European Convention on Human Rights

Likewise the European Convention on Human Rights can impact upon a member's ability to undertake certain operations. For example, the European Convention influenced British reluctance to use lethal force to defend property in Iraq and also underpinned its lack of support for the use of the death penalty by Iraqi courts during the occupation period.¹³

Domestic Law

Beyond a nation's international obligations is its domestic law. The actions that a nation is prepared to take in a particular conflict or peacekeeping situation are not merely an expression of a nation's international obligations. They also reflect domestic law and policy considerations. These matters concerning domestic law are not always apparent to coalition partners and unless discussed can be a source of uncertainty.

The uncertainty can be heightened by complicating factors such as how the particular coalition partner views the character of the operation. The impact of domestic law may vary depending on whether the operation is characterized as international armed conflict, non-international armed conflict or policing.

Coalition Operations: A Compromise or an Accommodation

An example of the impact of domestic law on operations is given by Captain M.H. McDougall, in her article "Coalition Operations and the Law."¹⁴ In examining the issues surrounding the transfer of detainees between coalition partners, she notes that issues of domestic law require consideration—in particular, Section 7 of the Canadian Charter of Rights and Freedoms, which may prohibit the transfer of detainees to coalition partners where they may be potentially subject to the death penalty.¹⁵

Criminal Offenses

Another influence on interoperability is the criminalization of behavior on the battlefield. For example, Australia, as a party to the Rome Statute, has introduced into domestic law a number of offenses to reflect its obligations.¹⁶ These, of course, have extraterritorial application.

Beyond the offenses introduced as a result of the Rome Statute, there is a continuing trend in Australia to make criminal offenses and regulatory regimes¹⁷ extraterritorial in their jurisdiction. For example, the Criminal Code Act 1995 makes it an offense in certain circumstances to cause the death of an Australian citizen or resident overseas.¹⁸ While the defense of lawful authority¹⁹ is likely to apply, there remains a risk that Australian personnel may be charged when an Australian citizen or resident is killed during operations.

This increase in offenses with extraterritorial jurisdiction means that commanders must increasingly consider whether operations potentially give rise to an offense being committed by themselves or their personnel. These offenses could be criminal in nature or aimed at such matters as environmental protection and occupational health and safety.

Damages

Apart from the criminal law, commanders are increasingly concerned about their possible responsibility for civil law claims arising from operations. Indeed in March 2008, an Iraqi family commenced an action for damages in the Queensland Supreme Court in Australia as a result of an incident in Baghdad in early 2005. The family, who was brought to Australia by the Australian government for medical treatment, alleges that it was fired upon without warning. While in this instance the family is suing the Australian government,²⁰ the case raises questions about the personal liability of soldiers who harm civilians during operations.²¹

National Policy

Beyond the law, however, is national policy. This should not be discounted because it is essentially the expression of the democratic will. There will always be matters

that—while lawful—are unpalatable and government direction to the military will be given to express the will of the people. National policy may or may not be visible to coalition partners and therefore may add further ambiguity to the coalition relationship.

How Do We Deal with the Constraints?

All of these matters—uncertainty over the US view of the principles underlying Protocol I, the Ottawa Convention, the characterization of an operation, domestic law and policy—may contribute to uncertainty as to what action a coalition partner may take. While this lack of legal clarity is a matter that must be addressed in the planning of and participation in coalition operations, it is not fatal to effective coalition partnerships. The evidence of this is the fact that coalition operations have taken place in a number of theaters since September 11, 2001. In spite of the differences, effective legal interoperability is very common.²² Accommodation of differences is made to facilitate operations.

The question then is what are the mechanisms that allow this to be achieved? Captain Dale Stephens, Royal Australian Navy, notes that legal interoperability has been achieved through a number of means, namely, by reservations or declarations to treaties and extensive consultation and sharing of military law manuals, as well as a psychological will to coalition mission accomplishment and the development of multilateral rules of engagement for operations.²³

Declarations

At the formal level, one mechanism used by nations to manage their varying treaty obligations is that of declarations.

Protocol I

In relation to Protocol I, declarations have been used to clarify coalition partners' obligations. For example, Australia has made a declaration that includes clarification as to the Australian understanding regarding the definition of "military advantage."²⁴ The effect of this declaration is that, while Australia is a party to Protocol I and the United States is not, it is still possible that the approaches of the two countries to issues such as targeting can be harmonized. However, while declarations have made it easier to manage conflicting approaches between the United States and Australia, it is clear that there are still differences—albeit the precise nature of these differences has been made more difficult to discern in relation to Protocol I in the post-September 11, 2001 environment.

Coalition Operations: A Compromise or an Accommodation

Ottawa Convention

In relation to the Ottawa Convention, Australia has again used a declaration of understanding. Among other matters, this declaration clarifies that operating with the armed forces of States which are not party to the Convention and that engage in activity prohibited under the Convention is not, by itself, a violation of the Convention.²⁵ The effect of the declaration is that Australia can act with States that are not party to the Convention in a coalition, provided that Australia does not assist, encourage or induce those parties to act contrary to the Convention. Thus, to ensure compliance, a party to the Ottawa Convention must be mindful in operational planning of what support is requested by the forces of a State that is not a party to the Convention and which possesses anti-personnel mines.

Domestic Law and Policy

Rules of engagement for members of a coalition can be different as a result of each partner's own domestic laws and policy.²⁶ In the area of domestic law and policy we must be mindful of our coalition partners' obligations to comply with their domestic laws. To ask them to do otherwise would be to undermine the rule of law and to fail to respect their sovereignty. As Charles Garraway said, to demand allies act outside the law that binds them "would make a mockery of the rule of law."²⁷ What we can do is to use open dialogue to better understand and accommodate issues of difference and respect our coalition partners when they decline a mission because of domestic considerations.

General

All of these differences may be encapsulated in coalition partners' rules of engagement. As Captain Dale Stephens said in his article "Coalition Warfare: Challenges and Opportunities," however, effective interoperability "[i]n the modern context of 'coalitions of the willing' . . . means achieving a harmonization of rules of engagement . . ."²⁸

To achieve interoperability at the working officer level requires critical examination of where the common approach may lie—although it should be noted that it is difficult to frame rules of engagement in circumstances where government policy as to the existing law is either unarticulated or has been the subject of changes. So how are these accommodations made at a practical level?

Practical Examples of Accommodation of Difference

Timor Leste

There are a number of practical examples of the accommodation of difference promoting effective coalition operations. An example of such a challenge, which has

received previous examination by Colonel Mike Kelly in his article “Legal Factors in Military Planning for Coalition Warfare and Military Interoperability,”²⁹ is operations in Timor Leste in 1999. As leader of the International Force East Timor mission, Australia was in the position of needing to forge a coalition to conduct stabilization and pacification operations in Timor Leste following militia violence that broke out after the vote for independence. Australian planners confronted the issue of aligning mission rules of engagement to accommodate all of the participating coalition States.

In this operation the mission rules of engagement formed the basis for operations. These rules of engagement were more expansive than some participating nation’s own rules of engagement. The more expansive aspects of the mission rules of engagement included provision for the use of up to and including lethal force to protect specifically designated property considered essential to the success of the mission.³⁰

This protection of mission-essential property was one of the more contentious aspects of the rules of engagement. A key issue was that the United Kingdom, New Zealand and Canada viewed this as only being acceptable where a direct association with the protection of life could be established.³¹ Some Australian uniformed lawyers took an expansive view of the use of lethal force to protect property.³² However, in a non-armed conflict, it is unlikely that Australian domestic law would permit the use of lethal force to protect property alone. Arguably property on which human life is dependent could be protected by the use of lethal force. Ultimately mission assignment had to accommodate this difference in views on the protection of property.

Likewise in the subsequent UN mission in Timor Leste, UN rules of engagement were issued. This highlighted the differences between UN rules of engagement and national rules of engagement. These differences presented a challenge that required a strategy to accommodate them. Coalition partners were canvassed as to their rules of engagement compliance. As expected, some coalition partners’ national rules of engagement were more restrictive than the UN rules of engagement and they were restricted by their rules of engagement from undertaking certain tasks.³³ In planning particular operations account was taken of this and ultimately the mission was not detrimentally affected by this approach. In the end, differences must be accommodated for a coalition to function effectively, thus ensuring appropriate recognition of the equality of States participating in a coalition.

Targeting

While not the only area of difference, a clear area where legal differences arise on operations is targeting. This is also an area where accommodation has been made

Coalition Operations: A Compromise or an Accommodation

on a number of occasions. The first time that the issue of legal planning factors impacting on interoperability was significant was in Operation Allied Force in 1999 in Kosovo.³⁴ According to Colonel Kelly:

The United States conducted some 80 per cent of the air strikes against the Serbs and the Americans increasingly chafed at the legal restrictions that other members considered applicable under Protocol I. The situation was compounded by the fact that NATO had no mechanism designed to enforce common legal standards.

As a result, NATO policy permitted member states to refuse bombing assignments if they regarded a particular target as being illegitimate. . . . In practice, however, most of the Serbian targets that were rejected . . . were subsequently attacked by the Americans.³⁵

This policy by the United States led to friction in the coalition and ultimately to an understanding that when you are trying to maintain cohesion in a coalition it is essential that the obligations and limitations of each member nation are well understood.³⁶ To fail to understand and ultimately to respect and accommodate the restrictions that other nations place upon themselves in coalition operations is to risk the coalition. As Dale Stephens stated in his article "Coalition Warfare: Challenges and Opportunities":

Just because the United States retains the full legal capacity to attack the types of objects prohibited by the Protocol to others does not mean that it will necessarily undertake such attacks. Policy imperatives regarding coalition cohesion plainly inform decisions concerning attack profiles.³⁷

Iraq 2003

An example of restraint arose in Iraq in 2003. By the time of the operations in Iraq, there was a greater understanding of the need to accommodate coalition sensitivities. This operation represented the first time for Australia that aircraft would deliver ordnance under the changed legal environment generated by the 1977 Protocol I.³⁸ Again referring to Colonel Kelly's examination of coalition operations, "The American targeting system was shaped by precautions that related to the lawfulness of striking individual targets and by a general need to minimise casualties and damage to vital installations."³⁹

Targeting in this operation involved a tiered system based on levels of authority required for approvals related, among other factors, to the anticipated number of civilian casualties and collateral damage.⁴⁰ While Australia used this system, the considerations for Australia took account of differences between itself and those

coalition partners not party to Protocol I. In targeting decision-making Australia operated according to national rules of engagement.

To assist Australian commanders planning operations to understand the legal obligations of other coalition partners, two matrices were developed—one for law of armed conflict and one for rules of engagement, noting that the rules of engagement were more prone to change. The law of armed conflict matrix, for example, listed issues such as anti-personnel mines and definition of combatant against each coalition partner and the known international obligations of each. The rules of engagement matrix followed a similar form and greatly assisted in reducing the areas of apparent difference highlighted by the law of armed conflict matrix.⁴¹

Where there were differences, they were accommodated by the “Red Card” system which allowed a mission to be declined.⁴² Even in circumstances where a mission was allocated and agreed, Australian pilots undertaking that mission were given the ultimate discretion not to strike a target which they assessed as not being a lawful target. This ultimate “Red Card” discretion was used and supported by senior Australian personnel.

Ottawa

As previously mentioned, in practical terms for coalition operations the greatest constraint of the Ottawa Convention has been the prohibition on assisting, encouraging and inducing activity that is prohibited under the Convention. This prohibition meant that air-refueling aircraft in Iraq in 2003 were ordered not to refuel any US airframe that was fitted with air-delivered anti-personnel mines, such as the scatterable, mixed-munitions GATORS system.⁴³ Clearly the operation of such a prohibition would need to be carefully considered and may not be absolute in all circumstances. An exception to the rule may be where the safety of the coalition aircraft needing to be refueled is at risk.

Another practical example of an accommodation to ensure compliance with the Ottawa Convention while supporting coalition operations with a non-party was the transport by coalition partners of US personnel. To ensure compliance, commanding officers of ships transporting US personnel took measures to satisfy themselves that those personnel were not carrying anti-personnel land mines. Provided this condition was met, personnel could be transported.

Opportunities

While these practical examples may seem to be constraining operations, they indicate an accommodation of the restrictions that coalition partners may have during operations. This accommodation of difference also leads to a greater

Coalition Operations: A Compromise or an Accommodation

contemplation of the value of any target or objective as against its cost to the overall coalition operation.

It would be wrong, however, to think that coalition operations are necessarily limiting. As Rear Admiral Gates said:

I would not want to leave you with the impression that political divergence always offers problems, in fact it often offers opportunities. It may be possible for a coalition commander to use the forces of another nation to undertake a task with more freedom of maneuver than would be available to their own forces. For example, I experienced this in the Red Sea in 1992/93 where Australian ROE give our units greater freedom of action, in certain areas, when conducting maritime interception operations with coalition partners. This was an advantage to the US commander, who subsequently employed RAN units closest to the Straits of Tiran at the mouth of the Gulf of Aqaba to intercept "inspection runners" when required.⁴⁴

In employing these innovative solutions, commanders have, of course, to be mindful of their individual legal responsibility for actions that they have been directed to take.

This accommodation of the differing obligations of coalition member States, like technical interoperability, forces an assessment of how best a State can contribute to coalition operations. Rather than asking what a State cannot do, the question is what it can do; where can it make the best contribution to the coalition and what does it need to achieve mission accomplishment within the restrictions placed upon it? Ultimately, making these accommodations, whether they seem to be restrictive or empowering, reinforces the equality of sovereign States necessary in an effective coalition partnership.

Conclusion

Legal interoperability in coalition planning and operations, like technical interoperability, is essential for mission achievement. As with technical interoperability, while we can aim for the perfect solution, diverging national interests will mean that there will continue to be differences among coalition partners that must be accommodated to ensure effective operations.

This accommodation should not be viewed as being detrimental; rather it has a positive effect on the conduct of operations. The process of dealing with differing coalition views on the applicable law and policy generates a greater level of self-awareness and critical examination that improves the way we conduct operations and aids adherence to the norms of international law. By and large it is important to people who are in the military of a democratic State that they act honorably. It is

also critically important for the maintenance of public support of the operation that they be seen to act honorably. To fail to understand and ultimately respect the constraints that other nations place upon themselves in coalition operations is to fail to treat them as equal coalition partners and to risk profoundly the efficacy of the very coalition.

Notes

1. Raydon Gates, *Toward 2015, Challenges for a Medium Navy: An Australian Perspective*, in *THE LAW OF WAR IN THE 21ST CENTURY: WEAPONRY AND THE USE OF FORCE* 259, 263 (Anthony M. Helm ed., 2006) (Vol. 82, US Naval War College International Law Studies).
2. *Id.* at 260.
3. Michael Kelly, *Legal Factors in Military Planning for Coalition Warfare and Military Interoperability: Some Implications for the Australian Defence Force*, *AUSTRALIAN ARMY JOURNAL*, Autumn 2005, at 161, 168.
4. WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 192 (1995).
5. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, *reprinted in* *DOCUMENTS ON THE LAWS OF WAR* 422 (Adam Roberts & Richard Guelff eds., 3d ed. 2000).
6. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 36 *INTERNATIONAL LEGAL MATERIALS* 1507, *reprinted in id.* at 648 [hereinafter Ottawa Convention].
7. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, C.E.T.S. No. 5.
8. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3.
9. Charles Dunlap, *Legal Issues in Coalition Warfare: A US Perspective*, in *THE LAW OF WAR IN THE 21ST CENTURY: WEAPONRY AND THE USE OF FORCE*, *supra* note 1, at 221, 223.
10. Kelly, *supra* note 3, at 167.
11. Charles Garraway, "England Does Not Love Coalitions" – Does Anything Change?, in *THE LAW OF WAR IN THE 21ST CENTURY: WEAPONRY AND THE USE OF FORCE*, *supra* note 1, at 233, 238.
12. Ottawa Convention, *supra* note 6, art. 1.
13. Kelly, *supra* note 3, at 166.
14. M.H. MacDougall, *Coalition Operations and the Law*, in *ISSUES IN INTERNATIONAL LAW AND MILITARY OPERATIONS* 195 (Richard B. Jaques ed., 2006) (Vol. 80, US Naval War College International Law Studies).
15. *Id.* at 201–202.
16. Criminal Code Act, 1995 (Austl).
17. *See, e.g.*, Section 5 of Environment Protection and Biodiversity Conservation Act 1999 (Cth), which applies the provisions of the Act to Australian citizens and residents outside Australia.
18. Sec. 115.1 Murder of an Australian citizen or a resident of Australia
 - (1) A person is guilty of an offence if:
 - (a) the person engages in conduct outside Australia; and
 - (b) the conduct causes the death of another person; and

Coalition Operations: A Compromise or an Accommodation

- (c) the other person is an Australian citizen or a resident of Australia; and
- (d) the first-mentioned person intends to cause, or is reckless as to causing, the death of the Australian citizen or resident of Australia or any other person by the conduct.

Penalty: Imprisonment for life.

- (2) Absolute liability applies to paragraph (1)(c).

Sec. 115.2 Manslaughter of an Australian citizen or a resident of Australia

- (1) A person is guilty of an offence if:
 - (a) the person engages in conduct outside Australia; and
 - (b) the conduct causes the death of another person; and
 - (c) the other person is an Australian citizen or a resident of Australia; and
 - (d) the first-mentioned person intends that the conduct will cause serious harm, or is reckless as to a risk that the conduct will cause serious harm, to the Australian citizen or resident of Australia or any other person.

Penalty: Imprisonment for 25 years.

Criminal Code Act, *supra* note 16.

19. "A person is not criminally responsible for an offence if the conduct constituting the offence is justified or excused by or under a law." *Id.*, sec. 10.5.

20. If individual military members were to be named as respondents to a damages action, the Commonwealth of Australia may have vicarious liability for their actions.

21. Rory Callinan, *Counting the Cost*, TIME.COM, Mar. 5, 2008, <http://www.time.com/time/world/article/0,8599,1719622,00.html>.

22. Dale G. Stephens, *Coalition Warfare: Challenges and Opportunities*, in *THE LAW OF WAR IN THE 21ST CENTURY: WEAPONRY AND THE USE OF FORCE*, *supra* note 1, at 245, 247.

23. *Id.*

24. In relation to paragraph 5(b) of Article 51 and to paragraph 2(a)(iii) of Article 57, it is the understanding of Australia that references to the "military advantage" are intended to mean the advantage anticipated from the military attack considered as a whole and not only from isolated or particular parts of that attack and that the term "military advantage" involves a variety of considerations including the security of attacking forces. It is further the understanding of Australia that the term "concrete and direct military advantage anticipated," used in Articles 51 and 57, means a *bona fide* expectation that the attack will make a relevant and proportional contribution to the objective of the military attack involved. It is the understanding of Australia that the first sentence of paragraph 2 of Article 52 is not intended to, nor does it, deal with the question of incidental or collateral damage resulting from an attack directed against a military objective.

Available at <http://www.austlii.edu.au/au/other/dfat/treaties/1991/29.html>.

25. Text of declaration available at <http://www.austlii.edu.au/au/other/dfat/treaties/1999/3.html>.

26. Dunlap, *supra* note 9, at 224.

27. Garraway, *supra* note 11, at 235.

28. Stephens, *supra* note 22, at 245.

29. Kelly, *supra* note 3, at 161.

30. *Id.* at 164.

31. *Id.*

- 32. *Id.*
- 33. Comments to author by Captain Dale G. Stephens, RAN.
- 34. Kelly, *supra* note 3, at 162.
- 35. *Id.* at 163.
- 36. *Id.*
- 37. Stephens, *supra* note 22, at 250.
- 38. Kelly, *supra* note 3, at 164.
- 39. *Id.* at 165.
- 40. *Id.*
- 41. Statement to author by Wing Commander Ian Henderson.
- 42. Kelly, *supra* note 3, at 165.
- 43. *Id.*
- 44. Gates, *supra* note 1, at 260.